

pretation does no violence to the meaning of which they are naturally susceptible."

Looking at this agreement, it is clear that the defendants agreed to sell the land to the plaintiff at \$8,000.00 subject to the terms and conditions mentioned therein. It is also clear in the preamble to the said agreement at the time when the agreement was made the said land was still registered in the name of Rosiah bte. Awang, deceased, who was survived by the defendants. It was stipulated that the defendants had presented a claim under section 53 of the National Land Code (Penang and Malacca Titles) for them to be vested with the said land. The time for the completion of the sale and the obligations of the parties were also provided in the said agreement. However, it is provided in clause 8 that if the vendors fail to complete the purchase in accordance with the stipulations contained in the said agreement, then the vendors had the right to refund the amount already paid under clause 1 and clause 2 of the said agreement. Taking clause 8 by itself, and interpreting it in the manner suggested by counsel for the defendants, it would mean that the defendants could for no apparent reason and unilaterally revoke the agreement and refund the deposit. In my opinion, this would be an absurd situation because it is clearly stated in clause 8 that failure to complete the purchase must be in accordance with the stipulations contained. In fact the key words in clause 8 are "in accordance with the stipulations contained". Obviously, clause 8 must be subject to the stipulations referred to in the preamble, *i.e.*, relating to the ownership or title to the said property. It does appear to me that the intention of the parties was that in the event the said property was not transferred to the defendants, then they shall refund the deposit paid under clause 1 and clause 2 to the plaintiff and the agreement comes to an end. It is the cardinal rule of construction that clear and unambiguous words prevail over intention, but if the words used are not clear and unambiguous, the intention of the parties shall prevail. I quote here a passage from the judgment of Lord Cottenham in *Lloyd v. Lloyd*⁽⁴⁾ at page 202:

"If the provisions are clearly expressed and there is nothing to enable the court to put upon them a construction different from what the words import, no doubt the words must prevail: but if the provisions and expressions be contradictory and if there be grounds appearing from the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention."

Clearly, in my opinion, the words in clause 8, taken in the literal meaning have failed to carry out the obvious intention of the parties, *i.e.*, that in the event the said property could not be transferred to the defendants, they shall refund to the plaintiff the deposit paid under clauses 1 and 2 of the said agreement. In my judgment, the defendants were wrong in terminating the agreement by refunding to the plaintiff the deposit paid under clause 1 and 2 of the said agreement. The plaintiff is entitled to specific performance of the said agreement. I, therefore, enter judgment for the plaintiff under Order 81 Rule 3 of the Rules of the High Court, 1980 and costs.

Order accordingly.

Solicitors : *Darshan Singh & Co.; Ariffin & Co.*

PERBADANAN KEMAJUAN EKONOMI NEGERI JOHOR v. LIM SHEE PIN & ANOR.

[O.C.J. (Shankar J.) February 17, 1985]

[Johore Bahru — Civil Suit No. 441 of 1975]

Contract — Contract to extract timber from 2060 acres — Actual workable acreage only 776 acres — Premium at \$72,100 plus tender price of \$77,000 — Premium proportionately reduced — Equity and good conscience demand pro rata reduction of tender price.

In this case, the plaintiffs (Johore SEDC) had accepted a tender of the defendants to extract timber from 2060 acres virgin land for a premium of \$72,100 (\$35 per acre) and tender price of \$77,000. The defendants found out that the area was not virgin land and made a representation to the Forest Department which had given permission to SEDC to extract timber. The Forest Department reduced the workable area from 2060 acres to 776 acres. The plaintiff insisted that the defendants were liable to pay the full amount of the tender price irrespective of the fact that the defendants had ample opportunity to inspect the area and they were bound to pay the full tender price. On failure of the defendants to pay the full amount, the plaintiffs filed a suit against the defendants. The plaintiffs were also not able to produce the original tender document in court as according to them it had been destroyed in a fire.

Held: plaintiffs should have in equity and good conscience followed the line taken by the Forest Department and reduced the amount payable to them *pro rata*. The amount of the tender price should therefore be reduced *pro rata*.

CIVIL SUIT.

C. K. G. Pillay for the plaintiffs.

Derrick Thambyah (Choo Keng Yong with him) for the defendants.

Cur. Adv. Vult.

Shankar J. : This is a claim by the Perbadanan Kemajuan Ekonomi Negeri Johor (hereinafter referred to as the SEDC) for a sum of \$52,160/- which they claim is due to them from the defendants by way of unpaid tribute on a timber extraction agreement.

The only witness for the plaintiffs was En. Jaafar bin Yusoff who was the plaintiffs' Deputy Manager for Land Development. He said that the SEDC had obtained a licence from the State Government to extract timber from land which had been set aside for FELDA Development. Some 20,000 acres had been made available by the Johore State Government for such development but the authority to extract timber was given to the SEDC by the Forest Department. Immediately after such authority was obtained the SEDC invited tenders from persons interested. These tenders were monetary bids by the tenderers for the right to extract timber in the areas which were the subject of the particular exercise. After the bids were received they were submitted to a Tenders Committee and the SEDC would then enter into a written agreement with the successful tenderer.

According to the amended Statement of Claim, paragraph 3, the SEDC sent out a tender notice November 23, 1973 inviting tenders relating to the compartment of 2,060 acres in the district of Kota Tinggi. I wish to emphasize here that this tender notice was not produced in evidence by the plaintiffs. What the plaintiffs did produce was a tender form relating to another compartment of 4,825 acres in the district of Kambau dated April, 1975 and signed by En. Jaafar bin Yusoff, P.W.1. He stated on oath that this form was the usual tender form. Clause 2 thereof provided that:

"Pemohon hendaklah memuaskan hatinya sendiri dengan adanya atau tiada kayu-kayu yang boleh dipasarkan di kawasan/blok itu sebelum menghantar borang permohonan-nya menurut syarat 4 di bawah ini."

Translation:

"The applicant shall satisfy himself as to the availability of

A marketable timber within the area/block before submitting his application in accordance with Clause 4 below."

En. Jaafar's explanation of failing to produce the particular tender notice relating to the present dispute is that there was a fire in 1976 in their office building and the original tender form was lost together with the files.

In response to the invitation to tender for the block at Kambau the defendants in the present action are said to have submitted a tender. A photocopy of this document was produced as exhibit P2. But there is no date on this document indicating precisely when it was sent by the defendants but from the special conditions endorsed thereon that the bid should reach the plaintiffs before February 22, 1975, I assume that this document was sent prior to that date.

Based on these two documents the substance of the plaintiffs' contention is that the agreement which is the subject matter of the present dispute must have been preceded by an invitation to tender in the same form as exhibit P1 and that the defendants in response did submit a bid in the form of exhibit P2 in the sum of \$149,100/-.

On June 17, 1974 a formal written agreement was concluded between the parties. The area of 2,060 acres more or less which was the subject matter of the agreement was more particularly shown delineated in red on a sketch plan attached to the agreement and marked A. But the plan attached to the photocopy of this agreement contained in the Bundle of Documents of the parties is not marked A. It is referred to as "PELAN 'Q' ". It seems safe to assume in all the circumstances that this was the document being referred to and the block of 2060 acres is described as block K3. In the legend to the plan it is of paramount importance to note that Block K3 for 2,060 acres is described as "kawasan belum dikerjakan" (or a compartment which has not yet been worked.) Although there was no evidence to support this, plaintiffs' counsel stated in his final submission that this plan was not that of the plaintiffs but that of the Forest Department which the plaintiffs took in good faith. The agreement required the defendants to complete the felling and extraction of all timber from the area at the earliest possible time and in any case not later than March 31, 1975. There were various other conditions which do not concern us here but it is noted that by clause 20 the defendants were to deposit \$3,000/- upon execution of the agreement.

In support of their case the defendants called En. Zulmukhshah bin Dato' Mat Shaari, the Deputy Director of Forestry, State of Johore. He produced the licence for the area with which we are concerned (See Ex. D3). It was only issued on June 19, 1974. The premium payable to the Forest Department under this licence was fixed at \$35.00 for one acre which multiplied by 2,060 acres gave \$72,100/-. According to the plan attached to this document block K3 for 2,060 acres is described as "hutan asal" (virgin jungle).

The covering letter from the SEDC Chairman dated June 20, 1974 stated that of the total premium of \$72,100/-, \$25,000/- had already been paid as evidenced by receipt No. 241356 but the balance of \$47,100/- was required to be settled within 1 month of the issue of the licence.

Now the agreement does not apportion the figure of \$149,100/-. It states that the full sum is to be paid by the defendants to the plaintiffs. And En. Jaafar bin Yusoff in the whole of his evidence did not say anything as to how the plaintiffs had arrived at the net figure of \$52,160/- for which they were claiming.

In paragraph 4 of the amended Statement of Claim there is an averment to the effect that the contract price of \$149,100/- consisted of forest premium being \$72,100/- and tender price being \$77,000/-. In paragraph 5 of the amended Statement of Claim it is averred that it was a term of the agreement that the defendants shall pay the said sum of \$72,100/- being forest premium direct to the plaintiffs for the plaintiffs' onward transmission of the same to the Forest Department Johore. I have not been able to find such a clause in the agreement.

In fact Clause 1 of the agreement leaves the amount of the forest premium blank.

Since the evidence before me indicates that the licence was issued only on June 19, 1974, that is 2 days after the defendants signed the agreement with the plaintiffs, it must follow that there was an implied agreement between the parties that the sum of \$149,100/- was to include whatever premium the Forest Department was disposed to fix for the area in question. Paragraph 3 of the Re-amended Statement of Defence admits the Statement of Claim paragraph 4 to this extent even though it leaves the actual amount payable to the plaintiffs at large. What happened thereafter was that the defendants wrote a letter to the Chief

A Forest Officer on July 8, 1974. Every word of this letter merits the most careful consideration. But suffice it for the purposes of this judgment to summarise the contents of that letter in the following way. The defendants drew the attention of the Chief Forest Officer that although the tender had described the area as a compartment which had not yet been worked and as virgin jungle the defendants had found upon inspection of the same that it had been worked previously by people planting gambier and what was more about 70% of the area consisted of belukar and ferns. As the premium had been calculated on the basis that the area was virgin jungle the defendants invited the Chief Forest Officer to send his representative to inspect the area to satisfy himself of the condition of the land and to reduce the premium accordingly. A copy of this letter was extended to the plaintiffs and in fact there is a rubber stamp on the photocopy produced to the Court to show that the copy letter was received by the plaintiffs on July 9, 1974.

E If the plaintiffs then took the view that all this was irrelevant and that the defendants were nevertheless obliged to pay them the full amount due under the agreement they certainly did not say at that point in time.

F On September 8, 1974 the Director of Forest Affairs Johore wrote a letter not to the defendants but to the Director of the plaintiffs wherein he referred to the appeal of the plaintiffs for a reduction of the premium. The letter reads as follows:

G "Merujuk kepada rayuan tuan supaya dikurangkan harga premium keatas kawasan Lesen yang tersebut diatas, adalah dimaalkan setelah timbangan diberi dengan dikaji semula supaya ditolak kawasan yang tidak berkayu seperti belukar tiup-tiup, resam dan paya maka seluas 776 ekar sahaja yang betul-betul berkayu dikenakan premium pada \$35.00 saekar.

H 2. Maka dengan kiraan baru, harga premium sekarang dikurangkan kepada sebanyak \$27,160.00 dan jumlah ini hendaklah dijelaskan dengan sekali gus dengan seberapa segera. Oleh sebab tuan telah membayar sebanyak \$25,000/- maka hendaklah tuan menambah hanya \$2,160/- sahaja. Saya harap tuan akan berpuashati dengan keputusan ini."

I Translation:

"With reference to your appeal as regards to the reduction of premium on the above-mentioned licenced area, this is to inform you that after deducting the area without timber like belukar tiup-tiup, resam and paya, only the area of 776 acres with timber would be charged a premium of \$35.00 per acre.

2. Therefore under the new calculations, the present premium is reduced to \$27,160.00 and this amount has to be paid in one lump sum as soon as possible. As you have already paid \$25,000/- you need only pay an additional \$2,160/-. I hope you will be satisfied with this decision."

What is significant about this letter is that the area of the compartment subject to premium under licence 40/74 has now been reduced to 776 acres and not 2,060 acres as before.

On November 12, 1974 En. Jaafar bin Yusoff on behalf of the Director of the plaintiffs wrote to the defendants demanding \$53,154/- to be paid within 7 days. The defendants replied on December 1, 1974. They pointed out that the figure of \$149,100 had been calculated on the basis of 2,060 acres of which \$72,100/- was premium for the Forest Department and \$77,000/- was for the plaintiffs. But after the defendants appealed the acreage had been reduced to 776 acres and the premium reduced to \$27,160/-. They computed that the amount payable to the plaintiffs should also be reduced accordingly and appealed to the plaintiffs for remedial action to be taken. But the plaintiffs' answer on December 31, 1974 was to reject the defendants' request out of hand. On November 18, 1975 they filed this action. In the time which has lapsed since the writ was filed the 1st defendant has disappeared and he did not attend Court. The 2nd defendant did.

Briefly his evidence was that he had relied upon the plan provided by the SEDC when he had submitted his tender. At the time he had only inspected a part of the area because that was his normal practice. But the subsequent discovery led to the correspondence which has already been set out earlier. The 2nd defendant said that it was not possible for him to inspect the land himself. People in the Forest Department had been invited to do that and it was on the basis of their inspection that the area of the compartment to be worked had been reduced to 776 acres. The defendants in their bundle of documents have produced copies of two receipts for \$2,000/- and \$50,000/- paid by the defendants to the plaintiffs on May 8, 1974 towards Account.

After the letter from the Forest Department dated September 8, 1974 it would appear that they paid a further \$2,160/- direct to the Forest Department being the balance due for premium calculated on the basis of 776 acres (see receipt dated September 9, 1974 in the defendants' bundle). The 2nd defendant said that he was so upset by the attitude of the plaintiffs in insisting upon payment

A based on 2,060 acres that they abandoned all further operations in the area.

B I must now deal with the factual issue which arises for determination in this case. The plaintiffs' contention is that all the tender documents were in standard form and that Clause 2 of the tender documents clearly gave tenderers an ample opportunity of satisfying themselves of the amount of timber available in any area to be worked before they made their bids. The effect of this contention is that the contract was a lump sum contract and that if the defendants made a mistake in assessing the amount of timber in the area to be worked they should be saddled with the consequences.

C As I see it, PW.1 En. Jaafar bin Yusoff appeared to be relying upon P1 and P2 as corroborating his testimony that the tenders were all in the usual form and that the tender for the agreement which is the subject matter of this dispute contained a clause similar to Clause 2 in exhibit P1.

D This point has not been proved to my satisfaction on balance of probabilities. Exhibit P1 and P2 relate to transactions which took place in 1975. P2 which is the bid must have been submitted on some date prior to February 22, 1975. The tender condition P1 is dated in April 1975 and I have had some difficulty in understanding how it could apply to a transaction which preceded it by 18 months.

E Merely because there was a fire in 1976 cannot give a blanket excuse for the non-production of relevant documents. The explanation should have been a little more convincing particularly as the amended Statement of Claim refers to the tender by a specific date, i.e., November 23, 1973 and I would have expected more cogent evidence from the plaintiffs as to why the document was not forthcoming and if indeed it was not available, then that it contained a Clause 2 in words identical to that shown in Exhibit P1.

F I hold therefore that on the balance of probabilities, the plaintiffs have not discharged the burden upon them that it was a condition precedent to the agreement in this case that the defendants had the onus of satisfying themselves as to the precise quantity of commercial timber available in the area to be worked and that once they put in their bid the actual amount of the timber available was irrelevant. But if I am in error here I would go on further to hold that even if the tender condition in 1973 contained a clause identical in wording to

Clause 2 in exhibit P1, the end result in this judgment should be the same.

This is my view because the plan supplied by the Forest Department clearly referred to the area to be worked as being 2,060 acres and that the quality of that land was virgin jungle. The same plan supplied by the plaintiffs refers to the same area with this slight difference that it is described as an area which has not yet been worked. In each case there were 2 representations. One as to the size of the area and secondly as to the quality of the material available thereon.

With respect to PW1, to say that the agreement dated June 17, 1974 was a lump sum contract and therefore the defendants were liable willy nilly to pay the tender price of \$77,000/- (excluding Forest premium) based on a working area of 2,060 acres does not seem to me to be right.

On June 17, 1974, notwithstanding the execution of the agreement between the parties, there were terms which had still to be finalised. The non-completion of clause 1 of the agreement is indicative of this as is the issue of the licence only on June 19, 1974 followed by the further negotiations between the parties for the reduction of the premium from \$72,000/- to \$27,160/-. Furthermore the working area of the compartment was reduced from 2,060 acres to 776 acres by the Director of Forest Department (see his letter dated September 8, 1974 – see PBD 11).

In these circumstances it is my finding that the plaintiffs should have in equity and good conscience followed the line taken by the Forest Department and reduced the amount payable to them *pro rata* because this is all they were in justice entitled to.

In short if the agreement is to be viewed as a lump sum contract it was not a lump sum contract for 2,060 acres but for 776 acres. The contract could in no sense be said to have become finalised until the area to be worked was known and the liability of the defendants for the premium payable to the Forest Department had been computed. Only then could the consideration for the contract be accurately determined. In conclusion I would agree with defence counsel that the proper sum due and payable to the plaintiffs is only \$1,005/- and there will be judgment for the plaintiffs for this amount.

The interest if any upon this sum and the date

A from which it is to commence and also the measure of the costs which are to be awarded to the plaintiffs are matters on which the Court invite further argument from the parties.

B Having heard further argument, I adjudge that the plaintiffs be entitled to their costs on the Magistrate's Court's Scale and only up to the date of the payment into Court by the defendants on April 11, 1979. The defendants shall have all their costs of the High Court Scale as from April 12, 1979. There will be no interest on the decretal amount and the sum of \$1,005/- paid into Court shall be paid out forthwith to the plaintiffs' solicitors in full satisfaction of the judgment herein.

Order accordingly.

D Solicitors: *Hassan Yunos & Co.; H.H. Long & Co.*

E

CHUNG KHIAW BANK LTD. v. SOI HUAN & ORS.

[O.C.J. (Shankar J.) March 7, 1985]

F

[Johore Bahru – Civil Suit No. 442 of 1984]

G *Contract – Guarantee – Joint and several guarantee to the bank given by directors of company – New directors appointed – Additional guarantee taken from new directors – Old directors not discharged – Guarantor's liability is secondary but can become primary by agreement – Guarantors can be sued even before a judgment had been obtained against the principal debtor – Variation of contract – Surety not discharged if agreement authorises the creditor to vary the terms – Extension of time to principal debtor – Surety is not discharged if the contract of guarantee empowers the creditor to extend the time – Contract Act, 1950, ss. 81, 86 & 88.*

H

I In this case the defendant and three others were directors of Tuahbina Sdn. Bhd. The company had taken a loan from the defendant bank which was guaranteed jointly and severally by the four directors. The directors subsequently sold their shares to the knowledge of the bank and new directors of the company were appointed in their place. Additional guarantees were taken from the new directors for the company's indebtedness. In February, 1983 the indebtedness of the company to the bank amounted to \$3,151,554. The bank sent a notice of demand to the company and the guarantors. On July 31, 1984, the bank initiated action against the defendants for recovery of the money under the letter of guarantees. On September 8, 1984, the court made an order for winding up of the company.